SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

No. 309

AKTIEBOLAGET SEPARATOR,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

BRIEF IN SUPPORT OF PETITION.

Statement.

Section 231 of the Revenue Act of 1936 provides that "every foreign corporation not engaged in trade or business within the United States and not having an office or place of business therein," shall be taxed under subsection (a) of that section. Subsection (b) provides that "a foreign corporation engaged in trade or business within the United States or having an office or place of business therein shall be taxable without regard to the provisions of subsection (a)."

The single question presented is whether a foreign corporation which maintains an office in the United States, but does not carry on its principal trade or business there-

from, is taxable under subsection (a), as the Commissioner claims, or under subsection (b), as the taxpayer claims.

The Board of Tax Appeals held that the petitioner was taxable as a nonresident foreign corporation under subsection (a) and consequently that there was a deficiency in income tax for 1936. The Board's opinion, dated September 30, 1941 (R. 19-33), is reported in 45 B. T. A. 243. The Second Circuit Court of Appeals affirmed the Board of Tax Appeals. Its decision, dated June 19, 1942, printed in the record (R. 136), was based upon its opinion in *Linen Thread Company* v. *Commissioner of Internal Revenue,* reported in 128 F. (2d) 166.

The date of the judgment of the Circuit Court of Appeals for the Second Circuit to be reviewed by this Court is July 6, 1942 (R. 137). The facts are summarized in the petition for certiorari.

Summary of Argument.

The decision below failed to take into consideration that the legislative intent and reason in prescribing a different method of taxation in subsection (a) from that prescribed in subsection (b) was wholly based upon administrative convenience in the collection of the tax. There was no reason for withholding from gross income at the source if the corporation maintained an office in the United States at which its net income within the United States could be determined and payment of the tax enforced. Whether or not the corporation carried on its principal trade or business from that office was immaterial. This interpretation does no violence to the word "office" which in its every-day meaning signifies only a place where a representative and records of the corporation can be found, and does not necessarily include the carrying on of a trade or business therefrom.

ARGUMENT.

I. The reason for prescribing different methods of taxing foreign corporations in Section 231 is wholly one of administrative convenience in the collection of the tax. A corporation which maintains an office in the United States where the amount of tax can be determined and collected is properly classified under Subsection (b) as a resident foreign corporation.

The differentiation betweeen nonresident and resident foreign corporations and the methods of taxing them was made in the 1936 Act because it was believed to be more convenient and effective, from the standpoint of administration of the tax, to apply a flat rate of tax upon the gross income of those corporations whose income tax was withheld at the source. A nonresident foreign corporation is simply a foreign corporation from which it is necessary to collect income tax at the source.

Under prior acts,[1] *all* foreign corporations whether or not engaged in trade or business in the United States and whether or not they had an office or place of business here, were taxed on their *net* income from sources within the United States. Provision was made for withholding the tax at the source of income payable to foreign corporations "not engaged in trade or business within the United States and not having an office or place of business therein."[2] All foreign corporations were allowed deduc-

---

[1] Revenue Act of 1934, Sec. 231, 48 Stat. 737; Revenue Act of 1932, Sec. 231, 47 Stat. 229; Revenue Act of 1928, Sec. 231, 45 Stat. 849; Revenue Act of 1926, Sec. 233(b), 44 Stat. 41; Revenue Act of 1924, Sec. 233(b), 43 Stat. 283.

[2] Revenue Act of 1934, Sec. 144, 48 Stat. 724; Revenue Act of 1932, Sec. 144, 47 Stat. 216; Revenue Act of 1928, Sec. 145, 45 Stat. 835; Revenue Act of 1926, Sec. 237, 44 Stat. 43; Revenue Act of 1924, Sec. 237, 43 Stat. 285.

tions and credits similar to those allowed domestic corporations, the benefit of which could be secured by filing a return. A foreign corporation "not having an office or place of business in the United States" could file the return and pay the tax six months and fifteen days following the close of the fiscal or calendar year.[3]

The obvious difficulties attendant upon permitting deductions and credits to be made by a taxpayer whose tax was withheld at the source by persons who could give the Collector no information that would enable him to determine the correctness of such deductions and credits, required a change from a tax on net income to a tax on gross income.

The revision in the 1936 Act was made for the express purpose of securing better administrative control over the collection of taxes from nonresident foreign corporations and from nonresident aliens. It was the belief of both the House Ways and Means Committee (House Rept. 2475, 74th Cong., p. 9, et seq.), and of the Senate Finance Committee (Sen. Rept. 2156, 74th Cong., p. 21, et seq.), in recommending the new Act, that "the proposed revision of our system of taxing *nonresident* aliens and foreign corporations will be productive of substantial amounts of additional revenue, since it replaces a theoretical system impractical of administration in a great number of cases."

When Congress in the 1936 Act set up a category of nonresident foreign corporations, it employed the identical language which it had used in the 1934 and preceding acts in describing corporations whose income was subject to withholding at the source, to wit, foreign corporations "not

---

[3] Revenue Act of 1934, Secs. 232-236, 48 Stat. 737; Revenue Act of 1932, Secs. 232-236, 47 Stat. 230; Revenue Act of 1928, Secs. 232-236, 45 Stat. 849. As to deductions see Revenue Act of 1926, Sec. 234(b), 44 Stat. 43; Revenue Act of 1924, Sec. 234(b), 43 Stat. 285. As to returns see Revenue Act of 1926, Secs. 239(a), 241(a), 44 Stat. 45, 46; Revenue Act of 1924, Secs. 239(a), 241(a), 43 Stat. 287, 288.

engaged in trade or business within the United States and not having an office or place of business therein." The nonresident foreign corporations of the 1936 Act were thus nothing but the old source-taxed corporations of the 1934 and prior acts with a new appellation.

Such corporations were to be dealt with upon a new basis. The tax was still to be withheld at the source and paid to the collector by the withholding agent. However, the new tax was imposed upon the fixed or determinable *gross* income received annually or periodically by such corporations from sources within the United States. The *nonresident* corporation no longer could secure the benefit of any deductions or credits. There was no necessity for its filing a return (Regulations 94, Articles 231-3, 232-1, 233-1, 235-2).

As to *resident* foreign corporations, the 1936 Act made no change. They were taxed, as all foreign corporations theretofore had been, on substantially the same basis as domestic corporations (although the rate of tax imposed on them was slightly higher). The tax continued to be imposed upon all of their *net* income from sources within the United States, and the deductions and credits to which they were entitled were similar to those allowed domestic corporations (Regulations 94, Article 232-1 (b)).

"Having an office or place of business" within the United States as used in Section 231 has no significance except as it relates to the feasibility of determining and collecting the tax. Clearly, if a corporation has no office or other place in the United States where its records as to American income and expenses are kept, and if there are no records of business transacted by it here, then there is no practicable way of checking its returns to ascertain whether it has correctly reported all of its income and whether the deductions taken are proper. A flat tax withheld at the source upon the gross income of such a corporation was clearly indicated as the best method of securing uniform collection.

On the other hand, Congress was satisfied that there had been, and would be, no difficulty about ascertaining and collecting, in the usual way, the correct amount of tax due from corporations having an office or other place here at which records of its American income and expenditures were kept, and could be found by the collector. It was entirely practicable in such cases to impose the tax upon net income. Of course, if it were doing business here, it would have such an office or place of business, or at least an agent or American representative of some kind, who would know about its American affairs and could be examined concerning them. *It was not the doing of business here that made it practicable to determine the correct amount of tax based on net income. It was the fact that a corporate representative and records could be found here.*

The 1936 Act did not impose any new tax upon resident foreign corporations. It did not confer an exemption or other special benefit on resident foreign corporations. It did not impose a tax on the privilege of engaging in a trade or business in the United States. It simply provided a more effective method of determining the tax to be paid by those foreign corporations whose income had been withheld at the source under the 1934 and prior acts, and designated such foreign corporations "nonresident." Other foreign corporations were designated "resident" and this category by express statutory definition included those having an office in the United States.

II. The statute unequivocally provides that a foreign corporation having an office in the United States shall be taxable as a resident foreign corporation under Section 231 (b).

A. *The clear language employed in Section 231 forbids a different meaning or application.*

In both subsections (a) and (b) the phrase "engaged in trade or business in the United States" is alternative with "having an office or place of business therein." The statute thus takes note of the common corporate practice of maintaining an office in jurisdictions other than those in which the corporation carries on its trade or business.

A foreign corporation, in order to qualify as a nonresident corporation under subsection (a), must show not only that it is "not engaged in trade or business within the United States" but also that it does not have "an office or place of business therein." A foreign corporation cannot be classified under subsection (a) unless both disqualifying conditions are absent. This Court has said of other provisions in a tax statute, "These conditions are expressed conjunctively; and it would be inadmissible in construing a taxing act to read them as if described disjunctively." *United States* v. *Field* (1921), 255 U. S. 257, 262.

In subsection (b), on the other hand, "having an office or place of business therein" is disjunctively set off, by the word "or," against "engaged in trade or business within the United States." Since each of these conditions "is complete in itself, 'or' merits its normal disjunctive meaning, *i. e.,* introductive of an alternative standard." *Gay Union Corporation* v. *Wallace* (App. D. C. 1940), 112 Fed. (2d) 192, 196, cert. denied 310 U. S. 647. Thus, a foreign corporation qualifies as a resident corporation under subsection (b) if it is either "engaged in trade or business in the United States" or else has "an office or place of business therein."

These complementary provisions of Section 231 clearly indicate that a foreign corporation which has an office or place of business in the United States cannot qualify under subsection (a) but can only qualify under subsection (b),

whether it is engaged in trade or business in the United States or not.

The meaning of the phrase "having an office or place of business" is free from ambiguity. It cannot be distorted to mean "office for the transaction of business or other place of business." In the absence of ambiguity there is no room for construction. *Caminetti* v. *United States* (1917), 242 U. S. 470, 485, 490.

In *Crooks* v. *Harrelson* (1930), 282 U. S. 55, the Court had under consideration Section 402 of the Revenue Act of 1918 which provided that the value of the gross estate for estate tax purposes should be determined by including therein all property (p. 57) "to the extent of the interest therein of the decedent at the time of his death which after his death is subject to the payment of the charges against his estate *and* the expenses of its administration *and* is subject to distribution as part of his estate." (Italics added.) The Court followed the *Field* case, *supra*, in holding that the requirements of this statute being expressed conjunctively, all of the requirements must be met, and consequently the statute had no application to property which was not subject to the payment of administration expenses. The Court said (p. 61):

> "Finally, the fact must not be overlooked that we are here concerned with a taxing act, with regard to which the general rule requiring adherence to the letter applies with peculiar strictness."

In *United States* v. *Merriam* (1923), 263 U. S. 179, 187-188, the Court said (p. 187):

> "On behalf of the Government it is urged that taxation is a practical matter and concerns itself with the substance of the thing upon which the tax is imposed rather than with legal forms or expressions. But in statutes levying taxes the literal meaning of the words

employed is most important, for such statutes are not to be extended by implication beyond the clear import of the language used."

The Board of Tax Appeals deemed it necessary to construe the word "office" to mean an "office for the transaction of business" because of its association in the same section with the terms "engaged in trade or business" and "place of business" thereby ignoring the clear meaning of the word "office" (R. 28). Where the meaning of a word, considered by itself, is not in doubt, however, neither the rule of *noscitur a sociis* nor any other rule of statutory construction may be invoked for the purpose of creating an ambiguity. *Russell Co.* v. *United States* (1923), 261 U. S. 514, 520; *United States* v. *Missouri Pacific Railroad Company* (1929), 278 U. S. 269, 277; *In Re Boggs-Rice Co.* (4th C. C. A. 1933), 66 F. (2d) 855, 858.

B. *As applied to a corporation, "office" has a well-defined commonly accepted meaning which does not necessarily include the carrying on of a trade or business therefrom.*

"Statutory words are uniformly presumed, unless the contrary appears, to be used in their ordinary and usual sense, and with the meaning commonly attributed to them."

United States v. *Temple* (1881), 105 U. S. 97, 99;
DeGanay v. *Lederer* (1919), 250 U. S. 376;
United States v. *Wurts* (1938), 303 U. S. 414, 417.

There is no uncertainty about the meaning of "office," "place of business," or "engaged in trade or business." Their several meanings have been uniformly recognized and enforced both by the federal and state courts in interpreting statutes involving taxation or the service of process. It was conceded or established in each of the follow-

ing cases that the corporation had an office or place of business within a particular state, but it was held, nevertheless, that the corporation was not subject to service of process or to the imposition of an excise or license tax (as the case might be) because it was not engaged in a trade or business therein.

Green v. *Chicago, Burlington & Quincy Railway Co.* (1907), 205 U. S. 530;

Toledo Railways & Light Company v. *Hill* (1917), 244 U S. 49, 52;

Maxfield v. *Canadian Pacific Railway Co.* (8th C. C. A. 1934), 70 F. (2d) 982, 984; cert. denied 293 U. S. 610, rehearing denied 293 U. S. 632;

Case v. *Smith, Lineaweaver & Co.* (C. C. E. D. N. Y. 1907), 152 Fed. 730, 731;

Fowble v. *Chesapeake & Ohio Railway Company* (D. C. S. D. N. Y. 1926), 16 F. (2d) 504, 505;

Hilton v. *Northwestern Expanded Metal Co.* (D. C. N. D. Ga. 1926), 16 F. (2d) 821, 822;

International Fuel & Iron Corp. v. *Donner Steel Company, Inc.* (1926), 242 N. Y. 224, 229;

People ex rel. Manila El. R. R. & L. Co. v. *Knapp* (1920), 229 N. Y. 502, 509.

In *People ex rel. Manila El. R. R. & L. Co.* v. *Knapp, supra,* a Connecticut corporation maintaining an office in New York City for the receipt, deposit and distribution of dividends, the maintenance of bank accounts and attention to its financing requirements, was held not subject to the New York license and franchise taxes by reason of such activities. The Court said (p. 509):

> "Each of those activities might as effectively, though not as conveniently, perhaps, have been done at the statutory office of Hartford. In the world of business and industry it would not have been thought that they

were subject to the interdiction or required for their validity or regularity the franchise of the state. The use or occupation by a foreign corporation of an office in this state for and the exercise there of the management or conducting in whole or in part of its internal affairs is not within the intendment of the Tax Law the doing of business in this state. A foreign corporation may be within this state for corporate purposes and not be doing business here within the meaning of taxing statutes."

A corporation may have a "place of business" even though it does not sell its goods there. *Chadeloid Chemical Co.* v. *Chicago Wood Finishing Co.* (C. C. S. D. N. Y. 1910), 180 Fed. 770, 771.

The Corporation Tax Law of 1909 (36 Stat. 112-113, C. 6, § 38) imposed an excise tax on corporations "engaged in business" in the United States with respect to "carrying on or doing business." It was consistently held that corporations merely maintaining an office in the United States were not subject to the tax. *McCoach* v. *Minehill Railway Co.* (1913), 228 U. S. 295; *State Line & S. R. Co.* v. *Davis* (D. C. M. D. Pa. 1915), 228 Fed. 246; *Bryant & May* v. *Scott* (D. C. N. D. Cal. 2d Div. 1914), 226 Fed. 875.

"Office" as applied to a corporation has a well-established meaning. It is a fixed place in which an authorized representative of the corporation may customarily be found, where corporate records are kept, and where corporate affairs are controlled and handled. That is the sense in which it was used in Section 231.

C. *A reading of the statute as a whole indicates that Congress attributed a meaning to "office" entirely independent of any association with the carrying on of a business.*

The phrase "engaged in trade or business," and the alternative phrase "having an office or place of business,"

are found not only in subdivision (a) and (b) of Section 231, but also in many other parts of the Revenue Act of 1936. These same phrases are found in the withholding provisions of Sections 143 (a), in 144 (a) and (b), and in the provisions taxing aliens contained in subsections (a) and (b) of Section 211. That these alternative phrases do not have the same meaning is evidenced by the meticulous preservation of their distinction throughout the Act, as well as in both committee reports. To ignore that distinction would require a rewriting of these important and substantial provisions of the Revenue Act by deleting the second phrase as superfluous. This the courts will not do.

> "* * * words which have a meaning, are not to be entirely disregarded in construing a statute." *Postmaster-General* v. *Early* (1827), 25 U. S. 135, 146.

The instances in which the words "engaged in trade or business" or the words "having an office or place of business" are used alone in the statute demonstrate that Congress did not regard these phrases as parts of a single concept, but differentiated between them, using each where it was appropriate.

Section 119 (a) (3), defining income from sources within the United States, excludes compensation paid a non-resident alien while temporarily in the United States for services performed for a "foreign corporation not engaged in trade or business within the United States."

Sections 235 (a) and 236 (a) fix six months after the close of the taxable year as the time within which to file a return and pay the tax due by any foreign corporation not "having an office or place of business" within the United States.

Section 53 (b) (2) provides that the returns of corporations shall be made to the collector of the district in which is located "the principal place of business" or "principal

office" or "agency of the corporation," or if it has no "principal place of business" or "principal office" or "agency" in the United States, then to the collector at Baltimore, Maryland.

There is nothing in the history leading to the adoption of the Act, in the Committees' reports, or in the Act itself which suggests that Congress in enacting Section 231 had any intention but to classify resident and nonresident foreign corporations solely upon the ground of accessibility of the corporation and its records to the Collector.

That administrative convenience was the sole purpose to be served by the revised method of taxing nonresident foreign corporations and aliens was the view taken in the dissenting opinion of the Board of Tax Appeals below (R. 30-33), in which three members concurred. It became the unanimous view of the Board in the later decision of *B. W. Jones Trust for Brigadier General O. C. Herbert, by D. B. Nevius, one of the Trustees, et al.* v. *Commissioner of Internal Revenue* (March 10, 1942) 46 B. T. A. 531, 534, in which it was held that an office maintained by the trustees of a trust created in England, some of the trust property being kept here, came within the meaning of Section 211 (a) of the Revenue Act of 1936, the provisions of which, with respect to resident and nonresident aliens, are substantially similar to those relating to foreign corporations contained in Section 231. The trust did no business here, and did not intend to do any business here other than the buying and selling of securities constituting part of the trust fund. The Board of Tax Appeals said (p. 534):

> "Prior to the enactment of the Revenue Act of 1936, the taxing authorities experienced great difficulty in collecting the tax from nonresident aliens. In 1936 a new method of taxation of such aliens was substituted for the former 'theoretical' method which had been found impractical in application. See H. R. No. 2475,

74th Cong., 2d sess.; S. R. No. 2156, 74th Cong., 2d sess. In brief, after the enactment of the Revenue Act of 1936, the taxation of aliens became more simplified. Where the alien is a resident of this country, is engaged in a trade or business here, or has an office or place of business in the United States, he is taxed, with certain limitations, in the same manner as a citizen of the United States. Where, on the other hand, the taxpayer is a nonresident alien doing no business here and having no office or place of business in the United States, he is taxed on his fixed or determinable annual or periodic income from sources within the United States and the tax is withheld at the source."

III. The regulation as applied by the court below is neither reasonable nor consistent with the statute.

The Circuit Court of Appeals decided this case on its previous opinion in the *Linen Thread* case, in which it had held that the statutory provisions were limited by Treasury Regulations 94, promulgated under the Revenue Act of 1936, which provide:

"ART. 231-1. TAXATION OF FOREIGN CORPORATIONS. * * *

* * * * * * *

"(b) *Resident foreign corporations.* * * *

"Whether a foreign corporation has an 'office or place of business' within the United States depends upon the facts in a particular case. The term 'office or place of business,' however, implies a place for the regular transaction of business and does not include a place where casual or incidental transactions might be, or are, effected.

* * * * * * *"

The regulation, it will be observed, does not attempt to define "office or place of business," but makes the deter-

mination whether one exists depend upon the facts in the particular case. That it is a place where regular, as distinguished from casual or incidental, transactions are effected is implied in the common meaning of an office. The regulation does not exclude all offices except business offices or offices at which the principal business of the corporation is carried on.

The Circuit Court of Appeals, however, construed the regulation as limiting the meaning of office to one at which the regular and principal business of the corporation is carried on. This is an invalid limitation of the plain meaning of the words of the statute. So interpreted, the regulation is unreasonable and contradicts the statute under which it was promulgated. The regulation cannot narrow the meaning of the statute. *Neuberger* v. *Commissioner* (1940), 311 U. S. 83, 89.

A regulation containing a clear definition of words used in a statute which require elucidation, provided it is neither unreasonable nor inconsistent with the statute, is entitled to consideration and will not be overruled except for weighty reasons. *Fawcus Machine Company* v. *United States* (1931), 282 U. S. 375; *Manhattan Co.* v. *Commissioner* (1936), 297 U. S. 129; *Magruder* v. *Washington B. & A. Realty Corp.* (1941), 315 U. S. —, 86 S. Ct. 858. The Court, however, is not bound by the administrative construction embodied in regulations. *Burnet* v. *Chicago Portrait Co.* (1931), 285 U. S. 1, 16.

A regulation which sets up a definition conflicting with the terms of the statute and eliminating conditions specified in the statute, so as to require words and phrases to be stricken out and others to be substituted for them, is unreasonable and inconsistent with the statute and, therefore, void. *Lynch* v. *Tilden Co.* (1923), 265 U. S. 315, 321.

The regulation in question, as applied by the Court below, is neither reasonable nor consistent with the statute. As

so applied, the regulation requires the phrase "office or place of business" to be stricken from the statute and the phrase "office for the transaction and carrying on of business or other place of business" to be substituted therefor. The construction adopted by the Court below deprives the phrase "office or place of business" of all practical content and renders it superfluous. It limits the statute solely to corporations which are engaged in trade or business in the United States.

The vice of the regulation as applied by the Court is that it assumes to convert a question of fact as to whether or not an office exists under the statute into a conclusive presumption that no office exists unless it is an office for the transaction of the principal business of the corporation.

> "This is beyond administrative power. The only authority conferred, or which could be conferred, by the statute is to make regulations to carry out the purposes of the act—not to amend it." *Miller* v. *United States* (1934), 294 U. S. 435, 440.

The Circuit Court of Appeals, in affirming on the basis of its opinion in the *Linen Thread* case, did not attempt to determine whether petitioner had an office in fact. It also failed to differentiate this case from the *Linen Thread* case on the obvious facts. In that case, the Court was guided solely by the findings of fact of the Board of Tax Appeals, since the record was not brought up by the petition for review. In this case, the entire record was before the Circuit Court. If that Court had considered the record it would have found ample evidence that the petitioner maintained an office in fact within the meaning of the statute. Petitioner did not use the office of an agent. Its office was one regularly maintained by the corporation itself.

The Circuit Court in its opinion in the *Linen Thread* case stated that substantial weight should be given to the fact that the administrative interpretation contained in the regulation has not led to any change in the statute, citing *U. S.* v. *Dakota Montana Oil Co.* (1932), 288 U. S. 459; *Taft* v. *Commissioner* (1937), 304 U. S. 351. This would be true if the regulation contained a clear definition of ambiguous statutory language, or stated in certain and unequivocal language the exceptions to be excluded from the application of the statute. That was the type of regulation this Court had under consideration in the cases cited by the Circuit Court.

An ambiguous regulation, on the other hand, or one which does not on its face adopt one of the several possible meanings of the statute, cannot be said to have received legislative approval by the subsequent re-enactment of the statute without change. Ambiguous regulations are of little value in resolving statutory ambiguities. *Burnet* v. *Chicago Portrait Co., supra.*

Here, it is not so much the regulation, but the way in which the regulation has been interpreted and applied that contravenes the statute. Even if Congress had approved the regulation there can be no basis for asserting that it has approved the present peculiar application of such regulation.

Conclusion.

Under the statute only one interpretation is permissible, to-wit: a foreign corporation which maintains an office in the United States at a fixed place at which the Collector can regularly find a properly authorized agent of the corporation and adequate records of the corporation's American income, a place at which such income is received and disbursed, and a place where the Collector can enforce

payment of the tax, is a resident foreign corporation taxable under Section 231 (b) of the Revenue Act of 1936 and cannot be taxed under Section 231 (a) of that Act.

A writ of certiorari should be granted, and this Court should review the decision of the Circuit Court of Appeals for the Second Circuit and finally reverse it.

Dated: New York, N. Y., August 5, 1942.

Respectfully submitted,

BENJAMIN A. MATTHEWS,
HAROLD HARPER,
Counsel for Petitioner.